# No. 17,389

IN THE

# United States Court of Appeals

## For the Ninth Circuit

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STEPHEN R. BENCHWICK,
*Appellant,*

vs.

UNITED STATES OF AMERICA,
*Appellee.*

**On Appeal from the United States District Court for the District of Hawaii in Criminal No. 11,546**

## BRIEF FOR APPELLEE

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## BRIEF FOR APPELLEE

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### JURISDICTIONAL STATEMENT

Appellee agrees with appellant's statement as to this Court's jurisdiction to hear this appeal, and as to the jurisdiction of the Court below.

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### STATEMENT OF THE CASE

Appellant, age 37 and sales engineer with Dearborn Chemical (R. 287-291), was charged with a thirteen count Information for violating Title 18, United

States Code, Sections 2 and 656, filed against him under waiver of indictment (R. 2).

The thirteen counts charged that appellant on thirteen different and separate dates did knowingly, wilfully and feloniously, with intent to injure and defraud an insured bank, Bank of Hawaii, aid, abet, counsel, induce and procure William Moss Vannatta, branch manager, to defraud and injure said bank, for thirteen separate amounts, ranging from $2500.00 to $70,400.00.

The uncontroverted evidence produced during the trial showed that appellant, a depositor with the Aiea Branch of the Bank of Hawaii where Mr. William Moss Vannatta was the branch manager (R. 301), began in 1959 with around $20,000.00 ($6,000.00 from savings and $14,000.00 from a mortgage on his house), to speculate in the stock market (R. 298-299).

The evidence further showed that on January 20, 1959, appellant's existing collateral loan of $2,000.00 was reset by Vannatta to a commercial loan of $5,525.00 (R. 76) which amount was also used by appellant to speculate in the stock market.

On April 9, 1959, appellant purchased more stocks through Dean Witter & Company and paid for these stocks with a check in the amount of $10,848.00 drawn on the Bank of Hawaii, Aiea Branch, where appellant's account had an insufficient balance of $2,242.21 (R. 194). Vannatta on April 13, 1959, authorized this non-sufficient fund check to be posted in the deferred items account and held there until April 24, 1959,

when the amount was then charged to appellant's account (R. 194).

Following this date to November 6, 1959, on numerous other occasions, appellant and Vannatta continued this same arrangement where appellant would draw on his account which was either of insufficient funds or overdrawn and Vannatta would order the non-sufficient fund checks be placed in the deferred items accounts for periods of 2 days to 27 days (R. 22, 194).

On November 24, 1959, December 7, 1959, and December 17, 1959, appellant wrote three checks for $5,600.00, $70,400.00, and $6,850.00, respectively (Exhibits 6, 7 and 8). These checks were again placed by Vannatta in the deferred items account (R. 22) because of insufficient funds. Appellant, however, failed to cover these checks by a deposit to his account when he sold all his stocks totalling $83,341.00 (R. 325-328), but instead lost most of it gambling in Las Vegas, Nevada (R. 327). Bank of Hawaii honored these checks and suffered the loss (R. 67).

During these periods while appellant's non-sufficient fund checks were held in the deferred items account, appellant speculated on the stocks he purchased expecting to sell at approximately the end of each month at a profit. When the stocks were sold the funds were deposited to his account to cover the non-sufficient fund checks (R. 258, 263, 272), except for the last three checks.

Although bank funds and credit were used by appellant, he paid no interest (R. 88). Vannatta and appellant had set up a collateral receipt arrangement

but this was loosely handled, and stock receipts were substituted freely (R. 76-81).

In fact, during the latter part of 1959, when appellant asked Vannatta for the stock certificates, Vannatta freely gave them to him which enabled appellant to dispose of the stocks represented by the certificates and to pocket the funds (R. 195).

No purpose statement, used by banks to prevent widening of margin, was ever required of appellant (R. 127).

The arrangement was such that on occasions when appellant wrote these checks, he called Vannatta for his approval (R. 203-204), and Vannatta would then assure Dean Witter & Company that the checks would be honored by the bank (R. 208).

Vannatta was aware that appellant was using funds to purchase stocks (R. 205). Appellant likewise understood the arrangement and knew that Mr. Vannatta would hold the non-sufficient fund checks which appellant had written (R. 359). Appellant further knew he was using the bank funds to speculate in the market (R. 360).

The Court found from the evidence that there were constant cooperation and collaboration by appellant and Vannatta with a view to the bank's honoring appellant's non-sufficient fund checks which was a fraud on the bank (R. 387).

The Court found appellant guilty on all thirteen counts (R. 390) and from which appellant now brings his appeal.

## ARGUMENT

### I

### IN A NON-JURY TRIAL THE DISTRICT COURT UPON REQUEST OF APPELLANT IS NOT REQUIRED TO ENTER SPECIAL FINDINGS OF FACT AT THE CLOSE OF GOVERNMENT'S EVIDENCE BUT ONLY AT TIME OF GENERAL FINDINGS.

Although the District Court made special findings at the time it made the general findings (R. 245), appellant argues that the Court erred because upon request by appellant it failed to make special findings of fact at the time it denied appellant's motion to acquit at the close of the Government's evidence. For this reason, appellant is without knowledge as to what mental process the Court went through, or what standard of law the Court applied in denying appellant's motion to acquit.

Appellant cites no cases or authorities in point but merely contends that a defendant in a criminal case should be entitled to the same consideration as a defendant in a civil case under Rule 41(b), Federal Rules of Civil Procedure, 1946 Amendment, U.S.C.A.

Rule 23(c) requires that in all cases tried without a jury, the Court or judge must make a general finding. In addition to a general finding, on request, the Court or judge must find the facts specially. *Barron & Holtzoff,* Federal Practice & Procedure, § 2124.

Failure of the Court to make general findings without the special findings, upon request, would result in reversible error. *United States v. Morris,* 263 F.2d 594 (C.A. 7).

As stated in *Cesario v. United States* (1 Cir. 1952), 200 F.2d 232, 233, ". . . That rule (Rule 23(c)) in-

dicates the proper procedure by which a defendant may preserve a question of law for purposes of appeal. . . ."

Does Rule 23(c) require the Court, upon request, to find the facts specially before it can rule on a motion to acquit at the close of the Government's evidence? The Government contends that the only reasonable interpretation to be given this Rule is that it mandates the Court in a jury waived trial to make special findings at the time of general findings only and at no other time. To say otherwise would require the Court to make special findings upon request on every motion served by litigants in a non-jury criminal trial. Words in a statute are to be given their known and ordinary signification, and the obvious, plain and rational meaning is preferable to a narrow, strained or hidden meaning. *United States Gypsum Co. v. United States,* 253 F.2d 738.

Appellant's request for special findings was made prematurely at the close of the Government's evidence (R. 23, 25), and the Court properly reserved the right to answer and did answer each request at the time of general findings (R. 245).

## II

### THE DISTRICT COURT PROPERLY DENIED APPELLANT'S MOTION TO ACQUIT BOTH AFTER THE CLOSE OF THE GOVERNMENT'S EVIDENCE AND AFTER ALL THE EVIDENCE WAS CLOSED.

Inasmuch as appellant concedes that this Court must review only the propriety of the latter motion, no argument will be made here on the first motion.

Appellant argues that there is insufficiency of evidence in the entire record to support the District Court's finding of guilt, and that the record is devoid of any evidence to sustain the Court's finding on each of the special findings of fact, more specifically, that appellant knew that Vannatta wilfully concealed appellant's checks contrary to bank regulations or made false entries in order to misapply moneys of the bank for the use and benefit of appellant, with intent to injure or defraud the bank, and that appellant knowingly collaborated or associated with Vannatta in those acts with intent to injure and defraud the bank.

Appellant's argument essentially may be stated that this is a crime requiring intent (intent to injure the bank) and unless appellant had knowledge of what Vannatta was doing or collaborated or associated with Vannatta, there could be no intent and the failure of the record to show this necessary ingredient requires this Court to acquit appellant.

Intent is one of the essential elements of the offense of aiding and abetting under 18 USC §§ 2(a) and 656. *United States v. Wicoff* (7 Cir.), 187 F.2d 886. The

intent to injure the bank is a necessary element of the crime. *Logsdon v. U. S.* (6 Cir. 1958), 253 F.2d 12. The absence of any showing of collaboration or association between the person charged and the principal prevents a conviction. *United States v. Moses* (3 Cir.), 220 F.2d 166. In order to aid and abet another to commit a crime, it is necessary that a defendant in some sort associate himself with the venture, that he participates in it as in something that he wishes to bring about, that he seeks by his action to make it succeed. *United States v. Peoni,* 100 F.2d 401.

As stated by appellant in his Opening Brief, the case of *Logsdon v. U.S., supra,* is most analogous to this one.

In that case, Logsdon was convicted under an indictment which charged in thirty-five counts that he aided, abetted and induced a codefendant Barrett, a cashier in a bank, to wilfully misapply moneys and funds of the bank, in violation of Sections 2(a) and 656 of Title 18, United States Code.

Logsdon wrote checks on his personal account and the building supply company account of which he had control, knowing that there were insufficient funds in both to cover the checks.

Barrett cashed these checks, and for a period of 4½ years was able to conceal this from bank examiners by means of withdrawing and hiding ledger sheets, juggling accounts, overstating cash on deposit with correspondent banks, and by withdrawing and hiding checks.

During this 4½ years, Logsdon issued 565 checks aggregating $149,415.14, and was overdrawn in his personal account in the amount of $74,704.94. From the building supply company account, in one year and seven months, he issued 557 checks and was overdrawn in the amount of $159,613.13.

The cashier testified not only that he notified Logsdon numerous times that he was overdrawn and that Logsdon would say that he had some money coming in from the sale of property and would cover the overdraft, but also that Logsdon knew that when his checks arrived at the bank the cashier would honor them and pay for them out of bank funds. It was not shown that the cashier received anything of value from Logsdon.

The evidence fails to specifically show any reason for the actions of the cashier. The cashier repeatedly stated in his testimony that he didn't know why he did it, and at one point stated that mental fatigue was the only thing he could think of.

Logsdon's defense was his lack of education, the fact that his personal account and the account of the company were mixed together, the fact that he did not keep check book stubs and only checked the checks returned by the bank to make sure the checks bore proper signatures, a very inadequate system of bookkeeping, his belief that he always had enough money in the bank to cover the checks, and a denial that the cashier ever told him he was holding checks which he had paid without charging them to his accounts.

From the evidence, the jury convicted, and Logsdon contends on appeal, among other things, that the evidence was insufficient to take the case to the jury on the charge that he aided, abetted and induced the cashier to misapply the funds of the bank. And Logsdon further contends that although the evidence shows overdrafts on his checking accounts, it does not show any collaboration between him and the cashier or any attempt on his part to induce the cashier to withhold his checks without charging them to his account, although paid out of the bank funds.

The Court stated:

> "As hereinabove stated, we agree with appellant that intent to injure the Bank was a necessary element of the crime. Intent may be shown by circumstantial evidence, and in criminal cases, that is usually the only evidence available. A reckless disregard of the interests of the Bank, as shown by the evidence in this case, was sufficient to warrant a finding by the jury of an intent to injure or defraud the Bank. A person is presumed to have intended the natural consequences of his acts. Mulloney v. United States, 1 Cir., 79 F.2d 566, 584; Savitt v. United States, 3 Cir., 59 F.2d 541, 543. We find no error in the instructions of the District Judge upon this issue."

Compare the instant case with the *Logsdon* case, *supra,* and note the similarities of facts, including the question on appeal.

Like the cashier in the *Logsdon* case, Vannatta did not receive anything of value from appellant for

placing the checks in the deferred account, nor could he give any reason why he did it. Both cases involved insufficient funds in the checking accounts. Although this case covered a period of months, almost a year, like the *Logsdon* case, it involved numerous transactions. Over this period of time, checks in the aggregate amount of some $240,000.00 were written (R. 22). Actual loss to the bank, or the amount overdrawn, was $83,341.00 (R. 325-328).

Like Logsdon, appellant was notified numerous times to cover his insufficient checks, and like Logsdon he made many assurances that he would do so. On other occasions, appellant would call Vannata for his approval to write these checks (R. 203, 204), and Vannatta would assure Dean Witter (payee) that the checks would be honored (R. 208). Like Logsdon, appellant knew that the checks would be held until they were covered (R. 359). Appellant also knew he was using bank funds to speculate in the market (R. 360).

Appellant's argument that he had no knowledge of Vannatta's irregular handling of the checks and that there was no knowing collaboration hardly seems tenable in view of the foregoing.

Appellant seems to be confused between his argument on knowledge, collaboration and intent.

Intent, as earlier stated in the *Logsdon* case, *supra,* is a necessary element of a crime. Intent may be shown by circumstantial evidence. Knowledge and collaboration are merely evidence of intent and like the ingredient of intent, they may be proven by circumstantial evidence.

That appellant had knowledge that Vannatta was holding up his insufficient fund checks until he covered them is undisputed. At times, he would call Vannatta to get his approval to write these checks and at other times Vannatta would call him to remind him to cover these checks (R. 204-215). The fact that appellant did not have intimate knowledge as to the exact method the irregularities were handled by Vannatta, that is, the placing of the checks in the deferred items account, is immaterial. Appellant knew that he was engaged in irregular practices, else why would he call Vannatta for approval?

As stated in Section 212, 20 Am. Jur.,

> "A knowledge of facts may be presumed or inferred under the circumstances of a case. One is presumed to know the truth in regard to facts within his own special means of knowledge, what a reasonable person ought to know from facts brought to his attention and whatever proper inquiry would disclose. The actual existence of a condition for a considerable period of time is presumptive evidence of notice or knowledge of its existence."

That there was collaboration between appellant and Vannatta is without doubt. Both appellant and Vannatta were constantly in touch with each other by phone.

The trial judge was correct when he found collaboration between the parties.

As stated by the trial judge,

> ". . . The evidence discloses, however, that prior to this check referred to in Count I, Van-

natta and Benchwick (appellant) over a period of some four months had been engaged in the same kind of activity, dealing in that period with some four previous checks held in Deferred Items from 7 to 20 days. I mention this because if a single transaction were involved, or even if the transaction first charged was the first one that occurred, a different situation might be presented than is presented here. We know from the evidence, by the testimony of the defendant Benchwick himself and Vannatta as well, that they were in constant collaboration and cooperation—in fact, they say so themselves—with a view of the bank honoring Benchwick's N.S.F. checks, a fraud on the bank. I don't know how you could have any better evidence of collaboration than we have in this case, because both of the individuals involved say they collaborated constantly, with a view of Benchwick writing N.S.F. checks, which Vannatta would not charge against Benchwick's account, but would hold them for varying periods, sometimes running into almost as much as a month. . . .

"If the first transaction between them, or the first one or two, perhaps, were the only ones involved, it might conceivably be a different matter. But when we see that these two men were frequently telephoning each other back and forth, checking with each other as to the amount of the checks that Benchwick was going to draw and when, consulting with the stock broker, all three together at times, it is ridiculous to suggest there was no collaboration between them. There was very extensive collaboration, if we accept only what Benchwick and Vannatta tell us about it, which probably is the minimum that might be

known of it. That is all that I can judge the case upon, and of course all that I do judge it upon.

"I answer the request for specific findings of fact in each instance in the affirmative. In my judgment the evidence shows beyond a reasonable doubt that each and all of the questions must be answered in the affirmative."

In considering the sufficiency of the evidence to sustain the verdict, this Court must take that view of the evidence which is most favorable to the Government and must give to the Government the benefit of all the inferences which reasonably may be drawn from the evidence. *United States v. Toner* (D.C.), 77 F. Supp. 908.

The Government, therefore, contends that the evidence was more than sufficient to sustain a finding of guilt.

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## III

**THE DISTRICT COURT PROPERLY CONSIDERED EVIDENCE OF EVENTS SUBSEQUENT TO THE PERIOD OF THE OFFENSES ALLEGED IN THE INFORMATION.**

Did the District Court err in admitting evidence of subsequent statements and conduct of appellant?

In criminal prosecutions whenever the intent of the accused is important, as in this case, a somewhat wider range of evidence should be permitted to show intent.

Where intent and knowledge are essential elements of the offense charged, evidence of transactions so con-

nected with the specific offense charged that it tends to show criminal intent or guilty knowledge is admissible. *Coffin v. U.S.,* 162 U.S. 664, 673, 16 S.Ct. 943, 40 L.Ed. 1109; *Moore v. U.S.,* 150 U.S. 57, 14 S.Ct. 26, 33 L.Ed. 996; *Wood v. U.S.,* 16 Pet. 342, 41 U.S. 342, 10 L.Ed. 987; *Strom v. U.S.* (6 Cir.), 12 F.2d 233, 234; *Boone v. U.S.* (8 Cir.), 257 F. 963, 966, 967; *Moffat v. U.S.* (8 Cir.), 232 F. 522, 533; *Galbreath v. U.S.* (6 Cir.), 257 F. 648, 658; *Wolfson v. U.S.* (5 Cir.), 101 F. 430, 433, 434; *Dorsey v. U.S.* (8 Cir.), 101 F. 746, 755, certiorari denied 178 U.S. 613, 20 S.Ct. 1030, 44 L.Ed. 1216.

Where trial is without a jury, it is presumed that the trial judge considered only competent evidence in arriving at his judgment. *Pasadena Research Laboratories v. U.S.,* 169 F.2d 375, certiorari denied 69 S. Ct. 83, 335 U.S. 853, 93 L.Ed. 401. Furthermore, in a trial without a jury, it would be assumed that the Court considered only evidence properly admitted and admissible, and any evidence claimed to be inadmissible is to be regarded as having been harmless, unless it clearly appears that otherwise the findings would have been different. *United States v. David,* 107 F.2d 519.

In cases or prosecution for crimes involving fraudulent intent, some Courts have displayed increasing liberality in admitting evidence of subsequent statements and conduct of a defendant. *Heindel v. U.S.* (6 Cir. 1945), 150 F.2d 493, 497; *United States v. Matot* (2 Cir. 1944), 146 F.2d 197, 198; *United States v. Wicoff* (7 Cir. 1951), 187 F.2d 886, 890-891.

Since intent and knowledge were in issue in this case, a wider range of evidence was permissible and it was within the trial judge's discretion to admit evidence subsequent to the period of the offenses alleged in the information. Even if such evidence was inadmissible, it was harmless and there is no reason to reverse the District Court's findings.

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## CONCLUSION

The appeal fails to show any grounds sufficient for reversal.

Dated, Honolulu, Hawaii,
September 22, 1961.

Respectfully submitted,

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